In the

Supreme Court of the United States

October Term, 1975

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Nos. 75-436 and 75-437

James L. Buckley, et al.,

Appellants,

vs.

Francis R. Valeo, Secretary of the Senate, et al.,

Appellees.

On Appeals from the United States Court of Appeals
for the District of Columbia Circuit and
the United States District Court
for the District of Columbia

Brief *Amici Curiae* on Behalf of The California Fair Political Practices Commission, Missouri Elections Commission, New Jersey Election Law Enforcement Commission, on the New York Board of Elections

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SUBJECT INDEX

Page

Interest of Amici Curiae 1

Summary of Argument 3

I. Ceilings on Campaign Expenditures are Not Unconstitutional Per Se. Each Limitation Statute Must Be Separately Scrutinized and Upheld if It Is Justified by a Compelling Governmental Interest 6

II. Campaign Contribution Disclosure Laws Are Constitutional 13

A. Contributions of Money Are Not Communications Protected by the First Amendment 14

B. Disclosure of Political Contributions Above a Minimal Amount Is Justified by Overriding Governmental Interest 20

C. Minority Parties and Candidates Are Not Constitutionally Exempt from Disclosure 24

Exhibit A

TABLE OF AUTHORITIES CITED

Cases

	Pages
Baird v. Arizona, 401 U.S. 1 (1971)	15
Bare v. Gorton, 526 P.2d 379 (Wash. 1974)	12
Bates v. Little Rock, 361 U.S. 516 (1960)	15, 20
Bell v. Procunier, 417 U.S. 817 (1974)	16
Brehm v. United States, 196 F.2d 769 (D.C. Cir.) cert. den., 344 U.S. 838 (1952)	18
CBS v. Democratic National Committee, 412 U.S. 94 (1973)	11
Central-East Los Angeles Socialist Workers Campaign Committee v. Pines (Calif. Ct. App., 2d App. Dist. Div. 4, Civ. No. 46258)	25
Cohen v. California, 403 U.S. 15 (1971)	16
Cox v. Louisiana, 379 U.S. 536, 379 U.S. 559 (1965)	15, 27
Egan v. United States, 137 F.2d 369 (8th Cir.), cert. den., 320 U.S. 788 (1943)	18
Ex Parte Curtis, 106 U.S. 371 (1882)	18
Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949)	15
Gibson v. Florida Investigation Committee, 372 U.S. 539 (1963)	15
Harper v. Virginia, 383 U.S. 663 (1966)	26
Jenness v. Fortson, 403 U.S. 431 (1971)	13
Kramer v. Union Free School District, 395 U.S. 621 (1969)	26

Cases

	Pages
Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961)	15
Miller v. California, 413 U.S. 15, 26 n. 8 (1973)	16
N.A.A.C.P. v. Alabama, 357 U.S. 445 (1958)	14, 15, 19
Oregon v. Mitchell, 400 U.S. 112 (1970)	22
Police Department v. Mosley, 408 U.S. 92 (1972)	27
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	11
Rosario v. Rockefeller, 410 U.S. 752, n. 10 (1973)	23
San Antonio School District v. Rodriquez, 411 U.S. 1 (1973)	7, 26
Saxbe v. Washington Post Co., 417 U.S. 843 (1974)	16
Shapiro v. Thompson, 394 U.S. 618 (1969)	26
Shelton v. Tucker, 364 U.S. 479 (1969)	15
Skinner v. Oklahoma, 316 U.S. 535 (1942)	26, 27
State v. Conifer Enterpises, 508 P.2d 20 (Wash. 1973)	12
Stoner v. Fortson, 379 F.Supp. 704 (N.D. Ga. 1974)	23
Talley v. California, 362 U.S. 60 (1960)	15
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	18
United States v. Boyle, 482 F.2d 755 (D.C. Cir.), cert. den., 414 U.S. 1076 (1973)	18
United States v. C.I.O., 335 U.S. 106 (1948)	19
United States v. Finance Committee, 507 F.2d 1194 (D.C. Cir. 1974)	23
United States v. International Union, 352 U.S. 567 (1957)	19
United States v. O'Brien, 391 U.S. 367 (1968)	16, 17, 20

CASES

Pages

United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (8th Cir. 1970), rev'd. on other grounds, 407 U.S. 385 (1972) 18, 19
United States v. Wurzbach, 280 U.S. 396 (1930) 18

Westbrook v. Mihaly, 2 Cal. 3d 765 (1970) 26
Williams v. Rhodes, 393 U.S. 23 (1968) 13

Zemel v. Rusk, 381 U.S. 1 (1965) 15

STATUTES

2 U.S.C. § 434(e) 17
Calif. Govt. Code:
§ 82013 12
§ 83111 2
§ 85101 4
§ 85104 ..... 4, 12
§§ 85300 et seq. 11
§ 89000 11
§§ 89000-1 4
§ 89001 11
18 U.S.C.:
§ 602 18
§ 607 18
§ 610 ..... 18, 19

Pages

CONSTITUTION

United States Constitution
First Amendment 4, 5, 8, 9, 11, 13, 14, 19, 26, 27

TEXTS

Note, 88 Harv. L. Rev. 1111, 1254-56 and n. 122 (1975) 11
Note, Developments in the Law—Elections, 88 Harvard L. Rev. 1111, 1247 n. 75 (1975) 28

MISCELLANEOUS

"Analysis of Federal and State Campaign Finance Law" (Cong. Research Service, Library of Congress, June, 1975) 7

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Brief *Amici Curiae*

INTEREST OF AMICI CURIAE

In 1974, the voters of California approved by approximately a two-to-one margin an initiative measure known as Proposition Nine, which enacted the Political Reform Act of 1974. The Act provides, *inter alia,* for disclosure of campaign contributions and expenditures of $50 or more, and for limitations on the expenditures permitted to be made by candidates for state-wide office or in respect of

initiative or referendum campaigns.[1] The Fair Political Practices Commission is created by Chapter 3 of the Act, and is charged with "primary responsibility for the impartial, effective administration and implementation" of the new law. CALIF. GOVT. CODE § 83111.

The Commission is joined in this brief by three other states. These states, like California, have enacted laws compelling, among other things, disclosure of contributions and limiting election campaign expenditures.

It is apparent that recent events have generated renewed and enhanced interest in election reform legislation. In some instances, the result has been more vigorous enforcement efforts as to existing (and perhaps theretofore underenforced) laws. In other cases, such as California, new legislation has resulted. To a considerable extent, these laws are now to be administered and enforced with a dedication—tempered, we trust, by sensitivity for the rights of political freedom and expression—not previously experienced. Yet the present case represents a concerted effort to obtain a broad judicial declaration that such laws cannot be squared with the First Amendment.

Amici believe the federal law before this Court is constitutional. *Amici* also believe that the various laws enacted by the states represented here (and, doubtless, by other states as well) represent valid efforts to protect the integrity of their political systems. They are concerned, therefore, that the effects on their respective experiments to remove the corrosive effects of money on the political process of any decision herein not be overlooked and to that end file this brief.

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1. Appellants are in error in stating that California has adopted contribution limits. See App. Brief, at 137. California law imposes no such limits, and this *amici curiae* brief does not address the constitutionality of that aspect of FECA.

SUMMARY OF ARGUMENT

I

Appellants seek the adoption of a per se rule condemning all campaign expenditure limitations. Such limitations have been adopted by thirty-seven states, and those statutory schemes vary considerably. While *amici* believe that the provisions of FECA are constitutional, in all events a per se disapproval of expenditure limitations is not warranted and care should be taken to avoid invalidation of statutes not presently before the Court.

The Constitution does not in principle forbid expenditure limitations. They serve fundamental and compelling governmental interests, including the reduction of competitive pressures upon candidates to raise large amounts of money, correction of the denial of effective access to the political system to those without substantial wealth, and counteraction of the impression (perhaps the reality) that money can be translated into votes. It cannot, of course, be denied that if limitations are set at an unreasonably low level, serious constitutional problems would arise to the extent that candidates are prevented from carrying their message to the electorate. But, as Appellants admit, "campaign money is subject to the law of diminishing marginal returns." App. Brief, at 97. Limitations which permit effective campaigning, yet diminish the disabilities that additional amounts of money inject into the political process, should be upheld.

Appellants urge that the even-handed limitations imposed by FECA benefit incumbents, and imply that since the statute was adopted by a legislative body whose members benefit by such legislation, the law should be viewed with suspicion. Many of the advantages said to be enjoyed by members of Congress are not shared by incumbent state officials, who do not have the franking privilege and rarely

have large staffs. Moreover, some state laws establish a lower limitation for an incumbent than the limitation applicable to the challenger. *E.g.,* CALIF. GOVT. CODE § 85101. Other potential advantages of incumbency can also be limited by legislation. *E.g.,* CALIF. GOVT. CODE §§ 89000-01.

Other aspects of the federal statute challenged in this Court are treated differently in the thirty-seven state counterparts. For example, Appellants challenge the $1,000 limitation imposed by FECA on expenditures by independent committees and individuals. Some state statutes handle the problem of independent expenditures differently. In California, for example, any independent committee or individual may spend up to $10,000 without restraint, and in some circumstances can spend as much as an additional $140,000. *See* CALIF. GOVT. CODE § 85104.

In short, the subject of campaign expenditure limitations has been seriously addressed by the people in and the legislatures of a number of states in recent years. The Court should hesitate to curtail this experiment in eliminating the excessive role played by money in political campaigns.

II

Forty-five states require disclosure of campaign contributions and their sources; of these, all but four set the minimum threshold for disclosure at $100 or $101 or less.

Appellants' reliance on the *NAACP* line of cases is based upon the faulty premise that the donation of money to political candidates is "speech" or "association" protected by the First Amendment. The First Amendment protects communication and not conduct. The giving of money, while it may facilitate communication by the recipient, is not an act of expression. Restraints on the giving of money (and it must be remembered that in this case the alleged restraint is the indirect "chill" disclosure is said to

achieve) do not forbid supporters of a candidate from giving speeches, writing articles, distributing pamphlets, or the like. Indeed, membership in a political party or organization is not subject to disclosure. Only the exchange of money has that consequence. No decision of this Court holds that the contribution of money is an act within the umbrella of the First Amendment, and such a holding would require a fresh appraisal of existing laws prohibiting contributions by federal employees, corporations and labor unions to candidates for federal office.

Even if the making of political contributions were protected by the First Amendment, Appellants' constitutional challenge would require a determination of whether governmental interests justify the indirect infringement of those First Amendment values. Appellants concede that, as a general principle, disclosure requirements are constitutional and, indeed, are "the proper solution" to many problems in the political process. App. Brief, at 171. They contend, however, that FECA's disclosure is overbroad in that it applies to all contributions in excess of $100, a feature which it shares with some forty-one states. The fixing of the appropriate threshold is, however, a legislative matter, and in this instance the line has been drawn at a reasonable point. Congress could reasonably conclude that contributions of $100 do have the potential of earning influence or access. Moreover, a substantially larger threshold would permit the concealment of significant illegal corporate or labor contributions in amounts just under the threshold. Similarly, those bent on noncompliance could make a contribution of just under the maximum amount and arrange for others to do likewise. For all of these reasons, the judgment of Congress should be respected.

Appellants also assert that the Constitution requires the exemption from disclosure of contributions to minority

parties and independent candidates. The Court of Appeals properly rejected this claim, noting that the present record contains only scant evidence of a "chilling effect" on such contributions. Even if the record had more persuasively supported Appellants' factual claims in this regard, disclosure would nonetheless be constitutional because it is supported by compelling governmental interests and because the exception which Appellants would carve is unworkable and undesirable. In the first place, the problems of defining those candidates and parties entitled to exemption would be enormous. Even if it could be accomplished, serious questions of fairness and evenhandedness would be presented. Finally, minority candidates can *affect* the outcome of an election even if they do not emerge victorious. Every vote which a third party or independent candidate receives is a vote which otherwise might have been cast for a major party candidate. There is, for these reasons, a substantial public interest in disclosure of the sources of financing of all candidates, not merely those with the greatest possibility of success.

I.

CEILINGS ON CAMPAIGN EXPENDITURES ARE NOT UNCONSTITUTIONAL PER SE. EACH LIMITATION STATUTE MUST BE SEPARATELY SCRUTINIZED AND UPHELD IF IT IS JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST

Amici believe that the expenditure limitations of the FECA are carefully drawn to serve the compelling governmental interest of minimizing the disproportionate influence over politics and government enjoyed by those individuals and institutions able to pump large amounts of money into election campaigns. We believe that the expenditure limitations are constitutional and should be upheld.

It is not our purpose, however, to address the specific constitutional merits of the expenditure limitations imposed by the FECA, a task which can better be performed by the parties. Rather, we hope merely to dissuade the Court from adopting, either explicitly or by implication resulting from unnecessarily broad language, any sort of per se rule regarding the constitutionality of campaign expenditure ceilings.

Although Appellants urge a finding of per se unconstitutionality (App. Brief, at 79-86), their arguments do not support such a conclusion but consist essentially of attacks on the specific provisions of FECA. We do not find these attacks persuasive, but even if they are accepted the Court should make it clear that limitation statutes containing different provisions and applicable in different political contexts will be upheld if under scrutiny they meet the requisite constitutional standards.

In recent years, thirty-seven states have adopted statutes limiting campaign expenditures. See "Analysis of Federal and State Campaign Finance Law" (Cong. Research Service, Library of Congress, June, 1975), at 31-43. These statutes have not derived from a common model; rather, almost without exception the people or the legislature of each state have done their own drafting, in light of local problems and conditions. It is probably rare that in an area of such significance the states have so effectively performed their roles as laboratories of social reform in so diverse a fashion. To be sure, the state legislation, like the federal, regulates in an area which, under the Constitution, is highly sensitive, and perhaps some of the statutes will fail to survive whatever degree of scrutiny the Court believes is appropriate. But when not only Congress but so many states have found that legislation is necessary, the Court

should hesitate to sweep too broadly. As the Court said (echoing a theme expressed often in the decisions of this Court) in another context, "the judiciary is well advised to refrain from imposing upon the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever-changing conditions." *San Antonio School District v. Rodriquez,* 411 U.S. 1, 43 (1973).

Appellants would have the Court believe that expenditure limitations are premised on the notion that there is such a thing as "too much" speech, a notion that is said to be inconsistent with the First Amendment. App. Brief, at 80. They misstate the case. The problem is not that there is too much speech in campaigns but that there is too much money. And the ever-increasing influx of money has produced a number of pernicious influences on the American political system. It has resulted in intense competitive pressures upon candidates to raise large amounts of money to finance their campaigns, has foreclosed or diminished effective access to the system to all but those that can afford it, and has created the impression, and possibly the reality, that money can distort the electoral process.

Spending limitations are designed to counteract these deleterious effects. They will relieve the competitive pressure to raise vast amounts of money, and thereby make it more likely that candidates will be able (1) to reject contributions which threaten their independence; (2) to spend more time representing their constituents by studying issues and governmental problems instead of attending fund-raising events and cultivating contributions; and (3) to finance their campaigns with contributions from legitimate supporters rather than special interests seeking access

and influence. Furthermore, spending limitations will help to open up the political process and to increase participation by those who have not been able to afford it as the ante has increased. Finally, limitations should counteract the illicit relationship between money and votes, and by so doing should restore confidence on the part of the electorate that public office cannot simply be bought.

Unquestionably, these are valid governmental objectives. Nevertheless, it is undeniable that limitations could be set at so unreasonably low a level as to prevent candidates from carrying their message to the electorate; we do not suggest that such laws should be immune from First Amendment attack. Limits which are in fact reasonable, however, do not suffer this infirmity because, as Appellants admit, "campaign money is subject to the law of diminishing marginal returns." App. Brief, at 97. Limitations which permit effective campaigning yet lessen the competitive pressure to raise funds should be upheld because they serve vital governmental interests and infringe, if at all, only minimally and incidentally on substantive communications.

Accordingly, the task for the Court is to scrutinize closely the specific provisions of FECA in the specific context of the federal elections which are regulated. That no per se rule is possible and that the Court should avoid needless generalizations appears affirmatively from Appellants' arguments purportedly in favor of a per se rule. For example, Appellants present the Court with a hypothetical state, apparently modeled on New Hampshire, in which they assert that because of particular local conditions higher than usual expenditures may be necessary. App. Brief, at 79-80. Appellants cannot seriously deny that Congress has good reason to impose uniform standards in federal elections in light of the serious drafting problems, to say nothing of equal protection considerations, which any alter-

native would create. *Cf.* pp. 26-27, *infra*. But however that may be, surely the fact that peculiar conditions may exist in New Hampshire has no relevance for the statutes administered by *amici*. The statutes of each state must be measured against the circumstances in that state. Indeed, Appellants themselves strongly assert that circumstances relating to limitations vary greatly from state to state. App. Brief, at 94. Their assertion illustrates the impossibility of a generalized approach.

At the center of Appellants' attack on the FECA expenditure limitations is the contention that the limitations benefit incumbent members of Congress. App. Brief., at 67-68, 87-104. Appellants imply that since the members had a conflict of interest in drafting and approving the legislation, the statute should be viewed with suspicion. A more probable reading of recent political history is that Congress adopted reform legislation against its members' perceptions of self-interest as a result of pressure from their constituents. However that may be, the Court certainly cannot establish a per se rule based on an assumption that thirty-three state legislatures[2] acted in the self-interest of members rather than in the public interest. State legislators do not have the franking privilege or large staffs which appellants assert slant even-handed limitations in favor of incumbent Congressmen. Moreover, in many states expenditure limitations were enacted along with provisions designed to equalize some of the advantages enjoyed by incumbents. In California, for example, the Political Reform Act establishes a spending limitation for an incumbent seeking reelection to the same office which is ten percent below the limitation imposed upon a challenger. CALIF.

2. The other four states which have adopted spending limitations did so by initiative.

GOVT. CODE § 85101. Moreover, an incumbent who has filed a declaration of candidacy is prohibited from sending any legislative newsletter or mass mailing at public expense. CALIF. GOVT. CODE § 89001. In the same spirit, a candidate's position on the ballot must be determined without regard to whether the candidate is an incumbent. CALIF. GOVT. CODE § 89000.

Appellants' contention that expenditure limitations are the product of incumbent legislators seeking electoral advantage also is disproved by the fact the voters of at least four states—California, Idaho, Missouri and Washington—adopted some form of expenditure limitation via the initiative process.

Appellants' proposed per se rule condemning expenditure limitations should also be rejected because the specific provisions of the various statutes adopted by the states contain significant differences. Many of the state statutes apply to situations without any analogy in the federal legislation. For example, there are no federal ballot measure or public question elections, but such elections are significant in states and localities which require voter approval for constitutional and charter amendments and bond issues, and which in some cases permit direct legislation by the voters in the form of the initiative and referendum. In such elections the disparity in spending on both sides may be more of a problem than the total spending, and laws adopted by some states to equalize spending (*e.g.*, CALIF. GOVT. CODE §§ 85300 et seq.) are designed to enhance rather than infringe First Amendment values. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969); *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

Even as to candidate elections, the limitations statutes contain significant differences. To take a single example, Appellants make much of the federal $1,000 limitation on expenditures by committees and individuals acting inde-

pendently of the candidate. App. Brief, at 107-15. This limitation is a justifiable and necessary provision to prevent circumvention not only of the expenditure ceilings but also of the federal limit on contributions. But if the Court believes the federal provision is too restrictive it should take care to reserve judgment upon state statutes, many of which approach the problem of independent expenditures differently. See Note, 88 HARV. L. REV. 1111, 1254-56 and n.122 (1975), which describes the variety of state statutes. Again looking to California by way of example, any independent committee (and this includes individuals as they can be "committees", CALIF. GOVT. CODE § 82013) may spend up to $10,000 without being subject to the limitations provisions of the Act; moreover, they may spend as much as another $140,000 (adjusted for cost of living increases) provided that the total expenditures by independent committees for a particular candidate do not exceed the latter figure. CALIF. GOVT. CODE § 85104. The effect of these provisions is to prevent circumvention by a candidate of the Act's expenditure limitations without any real, as opposed to a theoretical, infringement of an individual's opportunity to speak. The distinction is potentially significant, for it was the failure of the Washington limitations statute to allow for independent individual expenditures which contributed heavily to the court's invalidation of it; and it was that aspect alone upon which the three concurring justices rested. See *Bare v. Gorton,* 526 P.2d 379, 385 (Wash. 1974).[3]

The point here, however, is not to debate the constitutionality of California's law, or that of any other state, or to suggest that the California approach is superior to that

3. The concurring justices stressed that a properly drawn limitation statute might well be upheld. *Id.*, at 385. *Cf. State v. Conifer Enterprises,* 508 P.2d 20 (Wash. 1973) (upholding prohibition of expenditure of funds to pay initiative petition signature solicitors)

contained in the FECA. Rather, the purpose of *amici* is to illustrate that each state statute must be carefully examined with respect to its particular provisions, and the context in which it will operate, before a judgment regarding its constitutionality can be made. *Compare, e.g., Williams v. Rhodes,* 393 U.S. 23 (1968) *with Jenness v. Fortson,* 403 U.S. 431 (1971).

Thousands of American citizens and state legislators have worked hard in their respective states to formulate expenditure limitations that would improve the democratic process without infringing on First Amendment rights. Indeed, the purpose has been to enhance First Amendment values by increasing meaningful participation in the political process. In a few states millions of voters have directly approved such legislation. We urge that this Court not abort these efforts by per se rules founded on broad generalizations that blur or ignore significant distinctions between the approaches and circumstances of the various states. Accordingly, whatever the Court's decision regarding the federal legislation—and we reiterate our belief that FECA is constitutional—each state statute is entitled to be judged on its own merits.

II

CAMPAIGN CONTRIBUTION DISCLOSURE LAWS ARE CONSTITUTIONAL

In the previous section of this brief dealing with campaign expenditure limitations, we attempted to point out a number of points of rational difference between the FECA and various state laws. In view of the breadth of the challenge to the disclosure requirements of the FECA, however, such points of distinction are not readily found. The broad attack on the campaign contribution disclosure laws pressed

in this Court would, if successful, seriously threaten like disclosure requirements in at least forty-one states. Accordingly, in this portion of our submission we find ourselves compelled to address the merits directly.

Appellants vigorously press their claim despite their admission that in general contribution disclosure is an appropriate and effective method of deterring political corruption and improper conduct. See App. Brief, at 171. The essence of Appellants' challenge to the federal disclosure requirements is, as we understand it, two-fold: they apparently believe that the law requires too much disclosure in that contributions of as little as $100 must be reported (*id.*, at 184-89) and they oppose disclosure of contributions to "unpopular" or "minority" parties or candidates (*id.*, at 178-84).

Our submission here stresses three propositions: *First,* Appellants' reliance upon the *NAACP* line of cases is based upon the faulty premise that the *donation of money* to political candidates or organizations is "speech" or "association" protected by the First Amendment in precisely the same way as is membership in a political or social-action organization; we think it is not. *Second,* compelling governmental interests justify disclosure not only of extremely large contributions but of lesser ones as well. *Third,* it would be impractical and undesirable to exclude from the ambit of disclosure laws "unpopular" or "minority" candidates, and the Constitution does not command that result.

A. Contributions of Money Are Not Communications Protected by the First Amendment.

The cases on which Appellants rely begin with *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). None of them holds that the giving of money to a political candidate—as distinguished

from joining an association or making a speech or distributing a pamphlet—is protected by the First Amendment. The issue in these cases was whether the state could compel disclosure of or information from an organization's *membership lists* (*e.g., N.A.A.C.P. v. Alabama, supra; Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293 (1961); *Gibson v. Florida Investigation Committee,* 372 U.S. 539 (1963)), whether an individual could be compelled broadly to disclose his political associations in order to teach in the public schools (*Shelton v. Tucker,* 364 U.S. 479 (1969)), or whether an individual distributing a leaflet could be required to affix his name and address (*Talley v. California,* 362 U.S. 60 (1960)). In *Shelton v. Tucker, supra,* and in *Bates v. Little Rock,* 361 U.S. 516 (1960), the challenged law required disclosure of membership and amounts contributed; significantly, however, in each case the Court discussed the issues as if all that was at stake was the requirement that *the names of members* be disclosed. Thus, in striking down the disclosure requirement in *Bates,* the Court remarked that "compulsory disclosure of membership lists . . . would work a significant interference with the freedom of association of [the N.A.A.C.P.'s] members." *Id.,* at 523-24. Indeed, this entire line of cases was recently characterized by the Court as establishing that "[w]hen a State seeks to inquire about an individual's *beliefs and associations* a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. Arizona,* 401 U.S. 1, 6-7 (1971) (emphasis added).

It has long been held that the First Amendment protects *communication* and not *conduct. See, e.g., Giboney v. Empire Storage and Ice Co.,* 336 U.S. 490, 498-503 (1949); *Cox v. Louisiana,* 379 U.S. 536, 555; 379 U.S. 559, 563 (1965) (picketing); *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965) (right of speech and free inquiry does not include right to travel

to foreign country); *United States v. O'Brien,* 391 U.S. 367 (1968) (draft card burning); *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974) (right of press inquiry does not preclude limitations on press access within prison); *Pell v. Procunier,* 417 U.S. 817 (1974) (same). The Court recently observed that "the states have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller v. California,* 413 U.S. 15, 26 n. 8 (1973). In *Cohen v. California,* 403 U.S. 15 (1971), the Court carefully distinguished pure communication from "separately identifiable conduct . . . which, on its face, does not necessarily convey any message and hence arguably *could be regulated without effectively repressing* [*petitioner's*] *ability to express himself.*" *Id.,* at 18 (emphasis added).

The distinction between the standards applicable to laws which regulate speech and those which regulate conduct was clearly drawn in *United States v. O'Brien, supra,* at 376-77, where the burning of a draft card was defended as an act of symbolic speech reflecting opposition to the Vietnam War:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the

> quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

In the case of undisclosed contributors, of course, there is not even the possibility—as there was in *O'Brien*—that the conduct (there the burning of a draft card) is itself intended to communicate an idea. There is, moreover, no assurance that the money contributed will be used for purposes of facilitating speech. Political contributions are used for a variety of purposes other than the actual expression of views by the candidate. They may, for example, be used for further fund raising. Unless forbidden by law, they may even be used by the recipient to defray the expenses of public office. Finally, to the extent that a contribution is used for the expression of a candidate's views, the donor understandably will not (and surely *should* not) have any control over the *content* of the candidate's expression. Thus at best the contribution of money is several steps removed from speech itself.

The friends and supporters of the candidate or party are not restrained by the disclosure requirement from communicating their ideas: they may give speeches, write articles, and distribute pamphlets without disclosure under the Act.[4] The fact of membership in a political organization

4. Disclosure evidently would be required, however, if an individual directly expends more than $100 in these endeavors. 2 U.S.C. §434(e).

is likewise not subject to disclosure. It is only the giving of money or other things of value that is the subject of the required reports.

It is not surprising that the Court has never held that the mere exchange of money is an act within the umbrella of the First Amendment. Such a holding would require the fresh appraisal of a number of well established federal laws. For example, it has long been the law that federal employees may not contribute to the campaigns of persons seeking election to federal office (18 U.S.C. § 607), nor may federal officials accept such contributions (18 U.S.C. § 602). *See, e.g., Brehm v. United States,* 196 F.2d 769 (D.C. Cir.), *cert. den.,* 344 U.S. 838 (1952). The constitutionality of such a prohibition was upheld in *Ex Parte Curtis,* 106 U.S. 371 (1882); *accord*: *United States v. Wurzbach,* 280 U.S. 396 (1930). Subsequently, the Court in *United Public Workers v. Mitchell,* 330 U.S. 75, 97 (1947) spoke with apparent approval of the ban upheld in *Curtis,* adding:

> The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress. . . .

Likewise, federal law has for many years prohibited corporations and labor unions from making contributions in federal elections. 18 U.S.C. § 610. The Court has never decided a case as to the constitutionality of these prohibitions although the lower courts have upheld them.[5]

5. See *United States v. Boyle,* 482 F.2d 755 (D.C. Cir.), *cert. den.,* 414 U.S. 1076 (1973). *United States v. Pipefitters Local Union No. 562,* 434 F.2d 1116 (8th Cir. 1970), *rev'd. on other grounds,* 407 U.S. 385 (1972); *see also Egan v. United States,* 137 F.2d 369 (8th Cir.) *cert. den.,* 320 U.S. 788 (1943) (upholding prohibition in Public Utility Holding Act of 1937 against contributions by registered utility holding company). It is true that some members of the Court, in separate opinions, have expressed doubts as to the constitutionality of Section 610, but those concerns went to the restraint of that section upon the communication of ideas (in union-financed publications or communications) and not to the contribution of dollars to candidates or parties. *United States v. C.I.O.,* 335 U.S. 106 (1948); *United States v. International Union,* 352 U.S. 567 (1957); *Pipefitters v. United States,* 407 U.S. 385 (1972). The argument in these cases simply does not reach the contribution of money to a candidate; in that respect, it is significant to note that one of the dissenters, Mr. Justice Douglas, observed in *International Union* that large union contributions could be prohibited. 352 U.S. at 598 n. 2.

Under the circumstances, there is simply no basis in the cases decided by the Court for Appellants' assumption that the First Amendment protects the act of giving money to a candidate or political party. The point is of critical significance. Appellants contend that, under cases such as *N.A.A.C.P. v. Alabama,* the disclosure of contributions is like the disclosure of membership and must be justified by a compelling governmental interest. But that kind of rigorous judicial scrutiny, designed for the protection of core First Amendment rights, is misapplied to the exchange of money; moreover, in this phase of the case (as distinguished from that dealing with the portion of the Act limiting the amount which an individual may contribute), the attack is necessarily tangential because at the most disclosure can have only an indirect effect upon contributions.

To be sure, money contributed will facilitate speech. It can—although need not necessarily—be used to buy pamphlets or television air time. But it is one thing to say that the candidate has a right to speak and quite another to say that a supporter has the right to give the candidate money. The supporter's rights of speech and association are not restricted, let alone "chilled" by the threat of disclosure. Private support, personal assistance (such as the donation of supporters' labor) and the contribution of ideas, position papers, and draft speeches are not infringed nor is disclosure required.

The Court of Appeals recognized these principles (Slip Op., at 1516-17), and characterized the scope of review as defined by *United States v. O'Brien, supra.* Its opinion suggests, however, that in fact it applied an even more rigorous standard of review. (See *id.,* at 1519). We agree with the Court of Appeals that contribution disclosure legislation will in fact survive strict scrutiny and that compelling governmental interests support it. But we do not agree that strict scrutiny—of the kind which concededly would be appropriate were the disclosure requirements applicable to membership, association, or speech—is required.

B. Disclosure of Political Contributions Above a Minimal Amount Is Justified by Overriding Governmental Interest.

Even if the making of political contributions were protected by the First Amendment, that would only be the beginning—and not the end—of the inquiry. For it would also be necessary to determine that there are lacking any governmental interests which justify the indirect infringement of those First Amendment values. Thus in *Bates v. Little Rock, supra,* at 524, the Court said:

> Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgement of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.

The opinion of the Court of Appeals fully demonstrates (as, doubtless will Appellees in their brief) the various important public interests which contribution disclosure serves. See Slip Op., at 1511-16, 1543-48. Indeed, we do not understand Appellants to question either the constitutionality or desirability of disclosure laws as such:

> [A]ppellants believe that narrowly drawn disclosure requirements are the proper solution to virtually all the evils Congress sought to remedy by passing the challenged statutes. (App. Brief, at 171).

Appellants challenge the disclosure mandated by the FECA on the ground that it overbroadly applies to all contributions in excess of $100[6] rather than to contributions in excess of some presumably larger—though unspecified—amounts. See App. Brief, at 184-89. Because in only four of the forty-four states which require campaign contribution disclosure is the reporting threshold set at *more* than $101 (see note 7, *infra* and Exhibit "A") this aspect of the attack poses a serious threat to the laws of many states, including *amici.*

In the first place, it is a matter of judgment as to at what point political contributions become so unimportant to a candidate that the public interest in knowing of them is minimal and the possibility of purchasing influence and access is avoided. In local elections, of course, a contribution of $50 or $100 may be highly significant to a campaign; but even in federal elections contributions of $100 cannot be said to be minimal. Appellants believe that the line should have been set at some other point. But the drawing of lines is a legislative matter. Even accepting the proposition that the requirement of disclosure must be

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6. A second ground of challenge—application of the disclosure requirement to minority parties and candidates—is dealt with in Part II(C), *infra.*

supported by a significant governmental interest, it cannot seriously be argued that such a showing must be made to defend fixing the line at $100 rather than $397. As Justice Stewart said in *Oregon v. Mitchell,* 400 U.S. 112 (1970), with respect to the suggestion that the legislative determination of an age of majority for voting purposes might be tested by "strict scrutiny" equal protection standards:

> Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done. (*Id.,* at 294-95).

The vast majority of the states require disclosure of campaign contributions in a fashion comparable to the FECA. In Exhibit "A" we have summarized the applicable state laws. The enactments of thirty states compel disclosure of contributions over $50, eleven set the line at $100 or $101, and only four states set the line at higher amounts.[7]

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7. The breakdown is as follows:

Contributions	
Minimum Reportable Amount	Number of States
No Minimum	15
$ 5	2
$ 10	2
$ 15	2
$ 25	4
$ 50	5
$100	8
$101	3
$150	1
$200	2
$500	1
No Itemization	5

Although there are differences between the federal and state interests and circumstances, the wide-spread perception—as the laws of at least forty-one states demonstrate—of a need for disclosure of contributions of these lesser magnitudes cautions against acceptance of Appellants' attempt to second-guess the judgment of Congress in this regard.

There are other considerations of an intensely practical nature. Even if it could be said that contributions of, say, $500, are insufficiently large to have the potential of improper influence on a candidate or official, limiting disclosure to such contributions could, as a practical matter, render the disclosure law unenforceable. Contributions in large amounts could effectively be concealed by the use of a variety of techniques; for example, a contributor could make a contribution of just under the maximum amount and arrange for others to do likewise. Similarly, illegal corporate or labor contributions could be concealed through the use of individual "contributors" making contributions of $499. " '[I]n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means.' " *Rosario v. Rockefeller,* 410 U.S. 752, 762 n. 10 (1973).

In view of these considerations, the Court of Appeals correctly concluded that it had "no basis for holding that this approach by the legislature . . . in drawing the line [at $100] exceeded the bounds of reasonable latitude." (Slip Opinion, at 1545). Accord: *United States v. Finance Committee,* 507 F.2d 1194, 1200 (D.C. Cir. 1974); *Stoner v. Fortson,* 379 F.Supp. 704 (N.D. Ga. 1974). In *Stoner,* the court said:

> The Georgia General Assembly has made a legislative determination that $101 is the cut-off point above

which disclosures must be made in order to achieve their stated purposes. This court recognizes that a cut-off point had to be established somewhere. There is no doubt that all campaign contributors giving $101 or more do not make such contributions in an attempt to buy influence and to corrupt the elective process; however, for the legislation to be valid, there need be no showing that all would be so inclined. [Citations] This court views the $101 or more threshold as a rational attempt by the Georgia General Assembly to establish a level of contribution that will attract the attention of the candidate and thus begin to satisfy the goals of the statute. This court notes that federal judges, under court rules, disclose gifts over $100, that Georgia judges must do the same under the Code of Judicial Conduct, that the Federal Corrupt Practices Act of 1925, supra, required disclosures of contributions over $100, and that the new Federal Elections Campaigns statute, 2 U.S.C. 431 et seq., requires disclosures of contributions over $100. (*Id.*, at 712-13).

C. Minority Parties and Candidates Are Not Constitutionally Exempt from Disclosure.

Appellants contend that, in all events, disclosure laws cannot constitutionally be applied to "new and minor parties and independent candidates." App. Brief, at 178. It is not entirely clear whether Appellants would be satisfied to see exempted only those parties not entitled to automatic ballot access (see *id.*, at 184) or whether they likewise would exempt, as their brief implies, the likes of the Missouri Republican Party (see *id.*, at 174), George Wallace (see *id.*, at 173) or Appellant McCarthy.

The Court of Appeals rejected the claimed constitutionally-based exemption, resting in part on its determination that the record "presents only scant evidence tending to show a 'chilling effect' resulting from the major disclosure requirements, and only a skimpy indication of harassment

of those whose contributions were disclosed in the 1972 and 1974 elections. . . ." (Slip Op., at 1546). Nonetheless, the balance of the Court of Appeals' analysis persuasively demonstrates the existence of compelling governmental interests of the kind which, even if a showing of "chilling effect" could be made, would warrant the enforcement of a uniform disclosure requirement. Accordingly, while we agree that the judgment can be affirmed in this respect on the ground that no significant "chilling effect" was shown on the record, we believe that the logic of the Court of Appeals' governmental interest analysis in fact answers the question the court purported to reserve:

> It may well be that a party (or candidate) can demonstrate such harassment to itself or to its supporters as to underpin a ruling that disclosure in particular circumstances cannot constitutionally be required. *Compare NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). Whether the Commission through its regulations or its advisory opinions can appropriately address this situation is a question we do not decide in the absence of concrete facts. In any event, courts sit to act in such cases when presented with a proper record. (Slip Op., at 1548).

Litigation is now pending in the lower courts in which minority parties or candidates claim that the record does demonstrate a "chilling effect." *E.g., Central-East Los Angeles Socialist Workers Campaign Committee v. Pines* (Calif. Ct. App., 2d App. Dist. Div. 4, Civ. No. 46258) (appeal from denial of preliminary injunction against enforcement of disclosure provisions of California's Proposition Nine). Because the record in the present case does not support such a claim, it may be that the Court will wish to refrain from reaching that question of balancing interests. It seems clear to us, however, that for the very rea-

sons developed by the Court of Appeals in its opinion, the interests served by disclosure are so compelling that an exemption for "minority" parties is unthinkable. In this respect, we would like briefly to underscore several points in support of a uniform application of the disclosure laws.

First, the Constitution does not command miracles of legislative draftsmanship. The task of drafting an exemption for organizations which are both burdened with enormous community hostility *and* whose candidates are not serious contenders, would be enormous. Void for vagueness challenges would be inevitable.

Second, even assuming that careful drafting might have produced a statute clearly exempting some groups, further constitutional problems would render such a statute vulnerable to challenge by included candidates and parties. If, as Appellants contend, the area of campaign contributions disclosure is protected by the First Amendment,[8] then legislative lines must be drawn with special precision; by the same token, exemptions cannot be given absent a compelling justification. For where legislation regulates the exercise of rights expressly guaranteed by the Constitution, the "rational basis" test of review is inapplicable, and judicial review requires the court to adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny". *Westbrook v. Mihaly,* 2 Cal. 3d 765, 785 (1970). Legislatively specified inclusions and exclusions will be upheld only if justified by a *"compelling* governmental interest." *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969) (emphasis added). *See e.g., San Antonio School District v. Rodriguez,* 411 U.S. 1, 29-34 (1973); *Kramer v. Union Free School District,* 395 U.S. 621, 626-631 (1969); *Harper v. Virginia,* 383 U.S. 663 (1966); *Skinner v. Oklahoma,* 316 U.S. 535

8. In Part II(A) *supra,* we of course contend to the contrary.

(1942). Nowhere have the courts been more vigilant in this respect—and properly so—than in the areas protected by the First Amendment. *See, e.g., Police Department v. Mosley,* 408 U.S. 92, 94-102 (1972); *Cox v. Louisiana,* 379 U.S. 536, 581 (1965) (Black, J., concurring). As the Court put it in *Mosley,* "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.,* at 96. The point, of course, is not that an attack by a Republican or Democratic candidate would necessarily succeed; surely it is enough that those who drafted the statute avoided the constitutional difficulties which would have arisen had exceptions for "unpopular" or "minority" parties been written into the statute.

Third, in the same vein, there is an additional virtue in the refusal of Congress to exempt any group from the requirements of the law. The equal protection doctrines just discussed reflect a widely perceived principle of our jurisprudential system—namely, that special privileges and exemptions in the political process are disfavored. The FECA broke new ground in numerous respects; in some instances, in the interest of strengthening and purifying our democratic processes, it imposed new requirements and burdens. The efficacy of such legislation—indeed, virtually all legislation—depends on the citizenry and their willingness to accept and adhere to the requirements of law. Exceptions to any law, be it in the tax field or election reform, which the public cannot perceive as just, threaten public confidence and ultimately the Rule of Law.

Fourth, Appellants argue that some minority candidates or parties will always be minorities, and therefore represent no threat to the integrity of the parties process. They urge, in effect, an exception for candidates and parties

whose cause is hopeless. But who is to say that a candidate who seeks public office is not a serious contender? Appellants would have the law draw a line the ascertainment of which is rife with danger. In Oakland, California, for example, a Black Panther candidate for Mayor made a serious challenge; the candidacy of Governor Wallace on the American-Independent Party platform was seriously regarded in many states; and recently there was talk of the formation of a third party espousing conservative principles, with former Governor Reagan as the Presidential standard bearer. See also Note, *Developments in the Law—Elections,* 88 HARV. L. REV. 1111, 1247 n. 75 (1975). Candidates and parties are not entitled to ask the electorate for their votes while, in the same breath, proclaiming that their candidacies are not "serious".

Fifth, even a candidate who lacks a realistic chance of election can *affect* the outcome. This is so because, as the Court of Appeals recognized, each vote that a third party candidate receives is a vote which otherwise might have been cast for one of the major party candidates. Slip Op., at 1547. For this reason, no candidate is necessarily irrelevant to the campaign or even to the outcome of an election. (And, doubtless for this reason, there have been instances of major candidates contributing further to minor party candidates—a tactic which disclosure could reveal; likewise, as the Court of Appeals observed, minor parties can "be deliberately forced to take a stalking horse role." *Id.*).

For all of these reasons, the requirement of disclosure should not be riddled with a constitutionally compelled exemption of uncertain size and shape.

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Respectfully submitted,

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(Exhibit A follows)

Exhibit A

Minimum Reportable Amounts Under State Campaign Disclosure Laws

The following listing shows for each state the smallest reportable contributions under campaign disclosure laws.[1] Where "no minimum" is stated, the name of each contributor must be provided, no matter how small the contribution. Where the disclosure laws of the state have been revised in the last two years, the year of the revision is stated in parentheses.

The information contained in this exhibit is derived from Blum, ed., "Campaign Practices Legislation in the 50 States," *Campaign Practices Reports,* #1 (September 3, 1974). The information has not been double-checked against the statutes of the states, and therefore it is possible that some inaccuracies appear. In some instances where the source was unclear, information has been obtained from state officials.

1.	Alabama	$50
2.	Alaska (1974)	$100
3.	Arizona (1974)	$25
4.	Arkansas	No disclosure laws
5.	California (1973, 1974)	$50
6.	Colorado (1974)	$25
7.	Connecticut	No minimum
8.	Delaware (1974)	$100
9.	Florida (1973)	No minimum
10.	Georgia (1974)	$101
11.	Hawaii (1973)	$100
12.	Idaho	No disclosure laws
13.	Illinois (1974)	$150
14.	Indiana	No minimum
15.	Iowa (1973)	$100
16.	Kansas (1974)	No minimum
17.	Kentucky (1974)	$100
18.	Louisiana	No campaign disclosure laws (except as to corporations)

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1. In some cases, contributions "over" the amount stated must be itemized. In other cases, contributions equal to or greater than the amount stated must be itemized.

19.	Maine (1974)	$50
20.	Maryland	No minimum
21.	Massachusetts (1973)	$15
22.	Michigan (1974; new law effective in 1975)	$15
23.	Minnesota (1974)	$100 ($50 for local candidates)
24.	Mississippi	$500 ($100 for local candidates)
25.	Missouri (1974)	$25
26.	Montana	$5
27.	Nebraska (1973)	$100
28.	Nevada (1973)	No contribution disclosure law
29.	New Hampshire	No minimum
30.	New Jersey (1973)	$101
31.	New Mexico	No minimum
32.	New York (1974)	$50
33.	North Carolina (1974)	$50
34.	North Dakota	No contribution disclosure laws
35.	Ohio (1974)	No minimum (Contributions $25 if received at fund raising event)
36.	Oklahoma (1974)	$200
37.	Oregon (1973)	$25
38.	Pennsylvania	No minimum
39.	Rhode Island (1974)	$200
40.	South Carolina	No itemization required
41.	South Dakota	No minimum
42.	Tennessee	No minimum
43.	Texas (1973)	$10
44.	Utah (1973)	No minimum
45.	Vermont	$100
46.	Virginia (1973)	$101
47.	Washington	$5
48.	West Virginia	No minimum
49.	Wisconsin (1974)	$10
50.	Wyoming (1974)	No minimum